

**MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT  
SENTENCE BY A PERSON IN FEDERAL CUSTODY**

<b>United States District Court</b>	District Southern District of New York
Name (under which you were convicted): Victor Alvarez	Docket or Case No.:
Place of Confinement: MCFP Springfield	Prisoner No.: 34848-054
<div style="display: flex; justify-content: space-between;"> <span>UNITED STATES OF AMERICA</span> <span>Movant (<u>include</u> name under which you were convicted)</span> </div> <div style="display: flex; justify-content: center; align-items: center;"> <span>v.</span> <span>Victor Alvarez</span> </div>	

**MOTION**

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

United States District Court for the Southern District of New York

(b) Criminal docket or case number (if you know): 93 Cr. 181-9 (MBM)

2. (a) Date of the judgment of conviction (if you know): 1/17/1996

(b) Date of sentencing: 1/17/1996

3. Length of sentence: 420 months' imprisonment

4. Nature of crime (all counts):

Count 1: Seditious conspiracy, 18 U.S.C. 2384

Count 5: Bombing conspiracy, 8 U.S.C. 371

Count 6: Attempted bombing, 18 U.S.C. 844(i) and 2

Count 15: Interstate transportation of a firearm, 18 U.S.C. 924(b) and 2

Count 16: Using and carrying a firearm in commission of a crime of violence, 18 U.S.C. 924(c) and 2

5. (a) What was your plea? (Check one)

(1) Not guilty ☒      (2) Guilty ☐      (3) Nolo contendere (no contest) ☐

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?

6. If you went to trial, what kind of trial did you have? (Check one)      Jury ☒      Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☒ No ☐
8. Did you appeal from the judgment of conviction? Yes ☒ No ☐

9. If you did appeal, answer the following:

- (a) Name of court: Second Circuit
- (b) Docket or case number (if you know): Either 96-1044, 1045, 1060 to 1065, 1079 or 1080
- (c) Result: Affirmance of judgment of conviction
- (d) Date of result (if you know): 8/16/1999
- (e) Citation to the case (if you know): 189 F 3d 88 (2d Cir. 1999)
- (f) Grounds raised:

Multiple grounds, including sufficiency of the evidence; a challenge to the jury instructions; and a challenge to the Guidelines calculations and the imposition of consecutive sentences.

- (g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☒ No ☐

If "Yes," answer the following:

- (1) Docket or case number (if you know): 99-7094
- (2) Result:  
Denied
- (3) Date of result (if you know): 1/10/2000
- (4) Citation to the case (if you know): 120 S Ct. 831
- (5) Grounds raised:

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes ☒ No ☐

11. If your answer to Question 10 was "Yes," give the following information:

- (a) (1) Name of court: Southern District of New York
- (2) Docket or case number (if you know): 1 Cr. 175 (MBM)
- (3) Date of filing (if you know): 1/9/2001

(4) Nature of the proceeding: Motion to vacate under 28 U.S.C. 2255

(5) Grounds raised:

Including (1) that sentence was imposed in violation of Apprendi v. New Jersey, 530 US 466 (2000); and ineffective assistance of counsel.

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☐

(7) Result: Denied

(8) Date of result (if you know): 10/22/2003

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☐

(7) Result:

(8) Date of result (if you know):

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☒ No ☐

(2) Second petition: Yes ☐ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

**GROUND ONE:**

Count 5 no longer qualifies as a "crime of violence," an essential element of the 924(c) crime.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The Court should vacate Mr. Alvarez's conviction on the § 924(c) count and enter a judgment of acquittal on that count because, under *Johnson v. United States*, 135 S. Ct. 2551 (2015), the charged bombing conspiracy under 18 U.S.C. 371 (alleging a conspiracy to violate 18 U.S.C. §§ 844(i) and 842(a)(3)(A)) no longer qualifies as a "crime of violence," an essential element of the charged § 924(c) crime.

Conspiracy to violate 18 U.S.C. §§ 844(i) and 842(a)(3)(A) does not qualify under the so-called "residual clause" of § 924(c)(3)(B). That clause defines a "crime of violence" as a felony offense that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." This clause is materially indistinguishable from ACCA's residual clause, which was invalidated by the Supreme Court in *Johnson* and then held retroactively applicable in *Welch v. United States*, 136 S. Ct. 1257 (2016). Moreover, the charged conspiracy is not a "crime of violence" under the "force clause" of 924(c)(3)(A), because it does not necessarily require, as an element, either (1) the presence of violent physical force or (2) the intentional employment of such force.

**(b) Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

Ground 1 was not raised on appeal because the legal basis of Ground 1 was not available to him until the Supreme Court decided *Johnson*.

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

## GROUND TWO:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**(b) Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

**GROUND THREE:**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**(b) Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

#### **GROUND FOUR:**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):



**(b) Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

13. Is there any ground in this motion that you have not previously presented in some federal court?

If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

Ground 1 has not previously been presented in any federal court. Mr. Alvarez has not previously presented Ground 1 in any federal court because the legal basis of Ground 1 was not available to him until the Supreme Court decided Johnson.

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court

for the judgment you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

U.S. Court of Appeals for the Second Circuit, No. 16-\_\_\_\_. This is a motion, pursuant to 28 USC 2255 (h)(2), seeking permission from the Circuit to file a successive 2255 motion based on Johnson -- i.e., this motion. That 2255(h)(2) motion is pending in the Circuit and almost certainly will not be decided by 6/26/16. Out of an abundance of caution, see, e.g. Fierro v. Cockrell, 294 F.3d 674, 680-81 (5th Cir. 2002) (filing of motion for permission in Court of Appeals does not stop one-year clock), Mr. Alvarez is filing this 2255 motion in the district court to ensure compliance with the one-year statute of limitations of 28 USC 2255(f)(3), which commenced on 6/26/15, when Johnson was decided.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing:

(b) At arraignment and plea:

Frank Handelman, 325 Broadway, New York, N.Y. 10007

(c) At trial:

Wesley Serra, 20 Vesey Street, Suite 503, New York NY 10007

(d) At sentencing:

Wesley Serra, 20 Vesey Street, Suite 503, New York NY 10007

(e) On appeal:

Wesley Serra, 20 Vesey Street, Suite 503, New York NY 10007

(f) In any post-conviction proceeding:

Marjorie M. Smith, P.O. Box 234, Piermont NY 10968

(g) On appeal from any ruling against you in a post-conviction proceeding:

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?      Yes ☒ No ☐
17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging?      Yes ☐ No ☒
- (a) If so, give name and location of court that imposed the other sentence you will serve in the future:
- (b) Give the date the other sentence was imposed:
- (c) Give the length of the other sentence:
- (d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future?      Yes ☐ No ☐

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.\*

This motion is timely under 28 U.S.C. § 2255(f)(3) because it is filed within one year of June 26, 2015, the date on which the right asserted was initially recognized by the Supreme Court in Johnson, and the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.

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\* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief:

Vacate the § 924(c) count and the 60-month consecutive sentence imposed on it.

or any other relief to which movant may be entitled.

A handwritten signature in black ink, appearing to be "H. C. Q.", written over a horizontal line.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct  
~~and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on~~  
~~(month, date, year).~~

Executed (signed) on 6/10/2016 (date).

A handwritten signature in black ink, appearing to be "H. C. Q.", written over a horizontal line.

Signature of Movant

*counsel for*

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

I am the attorney for movant Victor Alvarez.